Office - Supreme Court, U.S.
FILED
JAN 29 1982
ALEXANDER L. STEVAS,
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Nos. 81-1016 and 81-1017

In the Supreme Court of the United States

OCTOBER TERM, 1981

GERALD A. AKERS, PETITIONER

v.

UNITED STATES OF AMERICA

PETER M. KENDALL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the trial court correctly determined that petitioners had abandoned a piece of luggage that contained cocaine.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 27-31)[1] is reported at 655 F. 2d 199.

JURISDICTION

The judgment of the court of appeals was entered on August 31, 1981. A petition for rehearing was denied on October 29, 1981 (Pet. App. 32). The petitions for a writ of

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[1]"Pet. App." refers to the appendix to the petition in No. 81-1017.

certiorari were filed on November 18, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial in the United States District Court for the Southern District of California, petitioners were convicted of possession of cocaine with intent to distribute and of conspiracy to possess cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and 21 U.S.C. 846, respectively. They were each fined $2,500 and sentenced to four years' imprisonment and a five-year special parole term. The court of appeals affirmed (Pet. App. 27-31).

Evidence developed at a suppression hearing showed that on October 17, 1979, narcotics agents in Florida alerted agents in San Diego, California, that petitioners were flying to San Diego for the purpose of delivering cocaine (Pet. App. 28). The San Diego agents were given descriptions of petitioners and the claim check numbers and descriptions of the luggage suspected of containing cocaine (*ibid.*; H. Tr. 4-8).[2] When the flight arrived in San Diego, the agents observed petitioners deplane and meet in the baggage claim area. Petitioner Kendall retrieved a suitcase matching the description given by the Fort Lauderdale police, and, when he left the terminal, the agents approached him and requested that he return for questioning in connection with a narcotics investigation. Another agent approached petitioner Akers and requested that he also return to the terminal for questioning (Pet. App. 28; H. Tr. 21-22, 65, 77).

While accompanying the agents back to the terminal, Kendall removed a baggage claim check from his wallet, showed the agents that the number on it did not correspond with the number on the suitcase he was carrying, which bore

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[2] "H. Tr." refers to the transcript of the suppression hearing.

the name Estrada or Estarda, and stated "that's not my bag." When an agent asked what he was doing with the bag, he responded, "I am not stealing it" (H. Tr. 42, 78). The agents then returned to the baggage carousel, placed the suitcase on it, and picked up an identical brown bag that Kendall identified as belonging to him. The claim check number on that bag corresponded with the number on Kendall's ticket (H. Tr. 42-43).

Petitioners both consented to searches of their luggage, which did not reveal any contraband (Pet. App. 28). After petitioners left, the agents determined that no person named Estrada had been a passenger on petitioner's flight and that the address on the suitcase bearing that name was fictitious. They retrieved the Estrada suitcase, which was the only one that had gone unclaimed, from the baggage claim area and opened it. The suitcase contained approximately three pounds of cocaine in hermetically sealed plastic bags (Pet. App. 28-29; H. Tr. 46-48, 78-79).

At the suppression hearing, Kendall testified that his reason for inviting the agents' attention to the name and claim check number on the suitcase was to induce them to believe that the bag was not his so they would return it to the baggage area. He further explained that, because Akers had a claim check to the bag, the ploy would enable them to retrieve it at a later time. Both petitioners claimed ownership of the bag and the cocaine found in it (H. Tr. 91-103).

2. Ruling that petitioners had abandoned the suitcase, the trial judge denied their suppression motions (H. Tr. 131-132). He found that "[t]he testimony of both defendants, * * * certainly by their actions that day, and by their testimony here in court, would support the inference that was intended to be given to the officers, that of disowning any interest whatsoever in the bag" (*id.* at 132).

The court of appeals affirmed. After conducting a thorough review of the facts, the court held that petitioners' objective manifestations with respect to the suitcase fully supported the trial judge's finding that they had abandoned it (Pet. App. 31).

ARGUMENT

Petitioners contend (81-1016 Pet. 16-24; 81-1017 Pet. 15-24) that the evidence failed to establish an abandonment of their proprietary interests in the suitcase and therefore that they retained a reasonable expectation of privacy in its contents. This fact-bound question was resolved against petitioners by two courts below, and further review by this Court is unwarranted. Moreover, on the particular facts of this case, the courts below correctly held that the suitcase had been abandoned.

The legal principles governing petitioners' factual claim that they did not abandon the suitcase are not in dispute. If a person has voluntarily abandoned property, he may not challenge the legality of its search and seizure. See *Abel* v. *United States*, 362 U.S. 217, 241 (1960). The basis of this principle is that "upon abandonment, the party loses a legitimate expectation of privacy in the property and thereby disclaims any concern about whether the property or its contents remain private." *United States* v. *Veatch*, 647 F. 2d 995, 998 (9th Cir. 1981) (footnote omitted). Abandonment is a question of the owner's intent as manifested to an objective observer by the owner's "words, acts and other objective facts." *United States* v. *Cella*, 568 F. 2d 1266, 1283 (9th Cir. 1978). See also *United States* v. *Sampol*, 636 F. 2d 621, 683 (D.C. Cir. 1980).

Here, Kendall expressly told the agents that the suitcase in question was not his (H. Tr. 22, 42). There is no doubt that such a denial of ownership constituted an objective manifestation of abandonment. See, *e.g.*, *United States* v.

Veatch, supra, 647 F. 2d at 999 (collecting cases); *United States* v. *Canady,* 615 F. 2d 694, 696-697 (5th Cir.), cert. denied, 449 U.S. 862 (1980); *United States* v. *Miller,* 589 F. 2d 1117, 1131 (1st Cir. 1978), cert. denied, 440 U.S. 958 (1979); *United States* v. *Colbert,* 474 F. 2d 174, 176-177 (5th Cir. 1973) (en banc). Indeed, not only did Kendall assert that the bag was not his, he also sought to bolster that assertion by showing the police that the number on it did not match the number on the stub of his claim ticket and by pointing out a similar suitcase that he stated was his bag. Moreover, he candidly admitted during the suppression hearing that these measures were calculated to cause the police to believe that he had no possessory interest in the bag (H. Tr. 94). He cannot now be heard to complain because his ploy was successful.[3]

Petitioner Akers contends (81-1016 Pet. 20-24) that, assuming Kendall's conduct constituted an abandonment of *his* possessory interest in the suitcase, the facts did not permit the inference that Akers abandoned his interest in it as well. But, as the court below noted (Pet. App. 31), Akers witnessed the proceedings during which Kendall, pointing to the different claim check numbers, disclaimed an interest in the suitcase, resulting in its return to the baggage claim area. Nevertheless, Akers made no effort to assert a property interest in the bag, although, unbeknownst to the police, he was carrying the correct claim ticket for the bag. Indeed, during the suppression hearing Akers admitted that

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[3]Petitioners both contend (81-1016 Pet. 18-20; 81-1017 Pet. 21-22) that they retained an objectively reasonable expectation of privacy in the bag because it was returned to the custody of airlines personnel, and the police suspected it was Kendall's when they later retrieved it. But it is of no consequence whether or not the police later suspected that the bag belonged to Kendall once he had disclaimed ownership of it. His words and actions constituted a renunciation of any further interest in the suitcase and "left him with no reasonable expectation of privacy" in it. *United States* v. *Veatch, supra,* 647 F. 2d at 999.

he and Kendall had prepared the bag so as to enable them to disclaim its ownership in the event of apprehension (H. Tr. 107-109). Thus, it was reasonable for the police to infer that Akers retained no possessory interest in the bag. Moreover, when Kendall disclaimed a possessory interest in the suitcase in accordance with the prearranged plan, he must be held to have acted as Akers' agent in abandoning the suitcase. Cf. *United States* v. *Cella, supra,* 568 F. 2d at 1283-1284 (co-defendants were defendant's agents in directing abandonment of property).[4]

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1982

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[4]Akers urges (81-1016 Pet. 22) that reliance upon his silence to support the conclusion that he joined Kendall in abandonment of the suitcase infringes upon his Fifth Amendment right against self-incrimination. This contention is insubstantial. While the Fifth Amendment may prevent a defendant's post-arrest silence from being used as evidence of his guilt (see *United States* v. *Hale,* 422 U.S. 171, 177 (1975)), the privilege against self-incrimination has no relevance to the question whether an individual may raise a Fourth Amendment challenge to a particular search. Clearly, a defendant's failure to assert a proprietary interest in seized property may be an objective indicator of whether he retains or has abandoned any privacy interest in that property. See *Rakas* v. *Illinois,* 439 U.S. 128, 148 (1978).